

The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON, et al.

Plaintiffs,

v.

ROB FAIRWEATHER, et al.,

Defendants.

NO. 2:21-cv-00002-JCC

**PLAINTIFFS' PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
PROPOSED FORM OF
INJUNCTIVE RELIEF**

Pursuant to the Court's Order (Dkt. #31) dated January 27, 2021, Plaintiffs submit the following proposed findings of fact and conclusions of law and a proposed form of injunctive relief.

I. PLAINTIFFS' PROPOSED FINDINGS OF FACT

A. The Parties

1. The forty-nine Plaintiffs in this case are State and local governments; tribal governments, Alaska Native Corporations, and tribal communities; and historical and cultural organizations. Dkt. #30 (First Amended Complaint) ¶¶17–66.

2. Defendants are the Office of Management and Budget (OMB), National Records Administration (NARA), Public Buildings Reform Board (PBRB), and General Services Administration (GSA), and the heads of those agencies in their official capacities. Dkt. #30 (First Amended Complaint) ¶¶67–74.

B. The National Archives at Seattle

3. The Federal Archives and Records Center in Seattle (Archives facility) is located at 6125 Sand Point Way NE, Seattle, WA 98115, and houses the National Archives at Seattle. It is currently occupied and operated by Defendant NARA, and is owned by Defendant GSA. Dkt. #16-1 at 109–10 (Fraas Ex. 5 at A-68).

4. The Archives facility houses the permanent, irreplaceable federal records of Washington, Oregon, Alaska, and Idaho that are particularly important to residents of the Pacific Northwest region, such as census and genealogical records, tribal records, records related to the Chinese Exclusion Act and immigration, and records related to the internment of Japanese Americans during World War II. Many of these records are unique, original documents, and the vast majority are un-digitized and not available online.

5. The Archives facility is routinely used by the agencies and public universities of Plaintiffs Washington and Oregon. The Washington State Department of Natural Resources and Department of Archaeology and Historic Preservation use the Seattle Archives to carry out their functions, which will be impeded if those records are moved over a thousand miles away. *See* Dkt. #17-1 (Bower ¶¶2–13; Brooks ¶¶2–9). State universities and their museums use the Seattle Archives to fulfill their functions. *See id.* (Wilson ¶¶ 9, 11, 13, 17–21, 27; Nash ¶¶2–10; Kucher ¶¶2, 6–10; Gregory Ltr.; Bond ¶¶8–12, 14, 17; Reid ¶¶4–9; Rushforth ¶¶4–5, 7–8, 10–11; Deitering ¶¶3–4, 6; Stein, J. ¶¶6–7). As these declarations attest, physical access to the records contained at the Archives is critical to the success of research and historical projects for these state institutions and for university research and recruiting.

6. The Archives facility’s tribal and treaty records also hold great value for Tribes, Alaska Native Corporations, and tribal members and communities, who are uniquely dependent on the facility’s records for core tribal functions and cultural preservation, including applying for federal recognition or restoration, establishing tribal membership, demonstrating and enforcing tribal rights to fishing and hunting, defending tribal sovereignty, implementing historic

1 preservation efforts, and conducting cultural anthropology work. *See id.* (Fisher ¶8; Gomez ¶¶4,
 2 8; Geyer ¶¶5–18; Hansen ¶¶3–4, 7; Harrelson ¶¶4–6, 9; Krise ¶¶5, 7; Pickernell ¶¶4–6, 9;
 3 Reynon ¶¶4–5, 9; Saluskin ¶5; Schutt ¶¶6–7; Forsman Statement; Reich ¶¶ 6–8; Simon ¶¶9–19;
 4 Stiltner ¶¶9–11; Strong ¶¶6–11; Taylor, A. ¶10; de los Angeles ¶9; Foster ¶4; King George ¶16;
 5 Kentta ¶¶5–7; Stiltner ¶¶4–8; Thomas ¶6; Trebon ¶¶ 4–6). For many tribal members, the
 6 Archives documents are “not just boxes of historical records,” but offer a profoundly tangible
 7 connection to their history. *Id.* (Hall ¶5; Farrar ¶7).

8 7. The Archives facility also contains over 50,000 case files related to the Chinese
 9 Exclusion Act of 1882, a critical resource for historical preservation organizations and Chinese
 10 Americans seeking information about their ancestors. Dkt. #30 (First Am. Compl.) ¶¶94–97.

11 8. In addition, the Archives facility—which sits on land farmed by the Uyeji family
 12 before their forced internment in 1942, and now houses internment-related records—has special
 13 significance for the local Japanese American community. *Id.* (First Am. Compl.) ¶¶98–100.

14 **C. The Archives Facility’s Use in Connection with Federal Programs**

15 9. Plaintiffs submitted numerous sworn declarations attesting to the use of the
 16 Archives facility in connection with various Federal conservation, agricultural, and recreational
 17 programs. *See* Dkt. #17-1 (Abe ¶5; Allen ¶5; Booth ¶6; Bossley ¶¶14–17, 21; Brooks ¶¶2–9;
 18 Carter ¶4; Geyer ¶¶6–9, 10–16; Harrelson ¶6; House ¶¶11–12, 13, 15, 18; King George ¶6;
 19 Mansfield ¶¶6–8; McCaffrey ¶¶6–7; Nash ¶9; Norris ¶5; Parham ¶¶7–10; Peterson ¶¶8–12;
 20 Schutt ¶7; Simon ¶¶17–19; Smythe ¶¶4–6; Stein, G. ¶¶2–3; Stiltner ¶¶4–8; Strong ¶10; Sullivan,
 21 J. ¶¶5–9; Sullivan, M. ¶¶5–11; Thomas ¶¶2, 5–6; Tushingham ¶6; Wilson ¶¶24–25; Wisniewski
 22 ¶¶6, 8–9.). Defendants did not submit any evidence rebutting these declarations.

23 10. Seattle Archives records are needed for research in connection with many federal
 24 programs for agricultural, recreational, or conservation purposes, including programs related to
 25 resource management and historical use of National Park Service (NPS) lands. Dkt. #17-1
 26 (Norris ¶5). The NPS “preserves unimpaired the natural and cultural resources and values of the

1 National Park system,” working to “extend the benefits of natural and cultural resource
2 conservation and outdoor recreation” nationwide. Dkt. #16-1 at 5 (Fraas Ex. 1).

3 11. According to the sworn declarations herein, researchers have used Archives
4 records for NPS-funded projects to guide the management of San Juan Island National Park;
5 document and conserve historic places important to Latino and African American communities
6 in the Pacific Northwest; and identify Alaska Native historic sites eligible for selection under the
7 Alaska Native Claims Settlement Act of 1971, which transferred land titles to Alaska Native
8 corporations. Dkt. #17-1 (Nash ¶9; Sullivan, M. ¶11; Smythe ¶4; Stein, G. ¶¶2–3). Through a
9 Japanese American Confinement Sites Grant, NPS also recently funded Archives research used
10 to aid visitor interpretation at several national historic sites. *Id.* (Abe ¶5). Archives research also
11 has been used to develop visitor education materials, exhibits, and trailhead and trail signage for
12 U.S. Forest Service projects at national parks and trails in the Pacific Northwest and Alaska.
13 Dkt. #16-1 (Booth ¶6; Allen ¶5; Smythe ¶6; Mansfield ¶8). And the Wing Luke Museum, a
14 Smithsonian affiliate and NPS Affiliated Area, alleges it uses the Archives in connection with
15 its mission. Dkt. #30 (FAC) ¶66.

16 12. Other federal agencies likewise use the Seattle Archives or fund Archives
17 research for ecological conservation programs, including the U.S. Department of Fish and
18 Wildlife, U.S. Army Corps of Engineers (USACE), Bureau of Land Management, and National
19 Oceanic and Atmospheric Administration (NOAA) among others discussed below. Dkt. #17-1
20 (House ¶¶11–12; Parham ¶7; Wilson ¶24).

21 13. According to numerous declarations submitted by leaders and members of
22 Plaintiff Tribes, the Tribes also make extensive use of the Archives facility in connection with
23 federal conservation, agricultural, and recreational programs. Many such programs are carried
24 out with federal funding provided under the Indian Self-Determination and Education Assistance
25 Act of 1975, as amended (ISDEAA), 25 U.S.C. §§ 5301–5423, as well as grants from various
26 federal agencies. For example, the Archives facility is used for research related to ecological

conservation, climate change impact assessment, and natural resource management programs; research for federally funded Tribal Timber, Fish & Wildlife programs and archaeological, cultural and ecological conservation purposes; research for conservation programs funded by ISDEAA, the Environmental Protection Agency (EPA), USACE, and NPS; research for conservation programs funded by NOAA, EPA, and the Bureau of Indian Affairs (BIA); research for conserving federal lands in Alaska, including under the Alaska National Interest Lands Conservation Act; and research for federally funded historic conservation research and environmental cleanup work. Dkt. #17-1 (Sullivan, J. ¶¶5–9; Thomas ¶¶2, 5–6; Stiltner ¶¶4–8; Geyer ¶¶6, 10–16; Strong ¶10; Peterson ¶¶8–12; Simon ¶¶17–19; Schutt ¶7; Peterson ¶9; Wisniewski ¶¶6, 8–9; Bossley ¶¶14–17, 21; Parham ¶¶7–10; Mansfield ¶¶6–8; Thomas J. ¶6; Stiltner ¶¶4–8; King George ¶6). The Klamath Tribes also recently used the Archives for research to protect treaty-reserved water rights in the Klamath River Basin in connection with a long-term federal restoration project to store and divert water for irrigation and habitat conservation. *Id.* (Gentry ¶11).

14. In general, tribal governments rely on the Archives for claims under the Native American Graves Protection and Repatriation Act and government-to-government relations, as well as to resolve land and water rights issues. *Id.* (Klinge ¶5; Taylor, J. ¶5; Gentry ¶11).

15. In addition, a U.S. Department of Agriculture Specialty Crop Block Grant is funding a Washington agricultural history project that will require Archives research related to irrigation, soil conservation, transportation, and educational programs. *Id.* (McCaffrey ¶6).

16. NPS’s National Register of Historic Places (the National Register) is another Federal conservation program that routinely involves use of the Archives. The National Register is “part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect America’s historic and archaeological resources.” Dkt. #16-1 at 9 (Fraas Ex. 2). It is authorized by the National Historic Preservation Act of 1966 (NHPA), which defines “historic preservation” to include “conservation” of historic properties. 54 U.S.C.

§ 300315(1). As established by multiple declarations in the record, nominating a property for inclusion on the National Register generally requires extensive use of the National Archives facility to establish the relevant criteria. Dkt. #17-1 (Brooks ¶¶2–9, Sullivan, M. ¶¶5–11; Carter ¶4; Geyer ¶¶6–9; McCaffrey ¶7; Smythe ¶5; Tushingham ¶6; Wilson ¶25; Harrelson ¶6; Bossley ¶¶14–17, 21).

17. Properties listed on the National Register are eligible for the Historic Tax Credit program. *Id.* (Brooks ¶¶6–7). As relevant to this program, the Internal Revenue Code defines “conservation purpose” to include “the preservation of an historically important land area or a certified historic structure.” I.R.C. § 170 (h)(4)(A).

18. Other similar programs include NPS’s Tribal Preservation Program, Historic American Buildings Surveys, Historic American Engineering Records, and Federal Certified Local Government program, which also conserve historical properties based on information obtained from the Archives. Dkt. #17-1 (Brooks ¶8; McCaffrey ¶7; Wisniewski ¶6).

19. NARA, which operates the Archives facility, has several “Preservation Programs,” including a “Conservation Division” that is generally responsible for document conservation. The Conservation Division’s page on NARA’s website states: “We assess the condition of the records and identify their composition, and we stabilize and treat documents to prepare them for digitization, exhibition, and use by researchers.” Dkt. #16-1 at 11 (Fraas Ex. 3). NARA also has a unit known as the “Document Conservation Laboratory” or “Conservation Lab.” *Id.* at 13–15 (Fraas Ex. 4). According to NARA’s website, the Conservation Lab “is responsible for conservation activities which contribute to the prolonged usable life of records in their original format.” *Id.* at 13 (Fraas Ex. 4). Among other activities, the Conservation Lab “repairs and stabilizes textual records (un-bound papers, bound volumes, and cartographic items) and photographic images among the holdings of [NARA] and provides custom housings for these records as needed.” *Id.* According to a sworn declaration submitted by a recently retired NARA Seattle employee, NARA conducts conservation-related activities as to documents

1 housed at the Seattle Archives facility, and staff at the Seattle Archives facility conduct
2 conservation work themselves. Dkt. #17-1 (House Decl. ¶¶13, 15, 18).

3 **D. FASTA’s Procedural Requirements**

4 20. FASTA, Pub. L. No. 114-287, 130 Stat. 1463 (2016), as amended, establishes a
5 process for selling federal real property on an expedited basis. The statute created an independent
6 Public Buildings Reform Board (the PBRB) and a process for the PBRB to identify and
7 recommend real property assets for disposal over a specified period, after which the PBRB will
8 disband. *Id.* §§ 4, 10, 12.

9 21. Certain property types are excluded from the definition of “Federal civilian real
10 property” that is subject to sale under FASTA. FASTA § 3(5). One type of exempt property is:
11 “Properties used in connection with Federal programs for agricultural, recreational, or
12 conservation purposes, including research in connection with the programs.” *Id.* § 3(5)(B)(viii).

13 22. FASTA Section 11 establishes a multi-step process to ensure the PBRB has the
14 needed decision-making framework and data to recommend properties for sale. The first step is
15 for federal agencies to make initial recommendations. FASTA § 11(a)(2). This must be done
16 “[n]ot later than 120 days after the date of enactment of this Act, and not later than 120 days
17 after the first day of each fiscal year thereafter until termination of the Board[.]” *Id.* § 11(a).

18 23. The second step is for the Office of Management and Budget (OMB) to “develop
19 consistent standards and criteria against which the agency recommendations will be reviewed,”
20 *id.* § 11(b)(1)(B), and, with GSA, to “jointly develop recommendations to the [PBRB] based on
21 the standards and criteria developed under paragraph (1).” *Id.* § 11(b)(2). “In developing the
22 standards and criteria under paragraph (1),” OMB and GSA “shall incorporate” ten enumerated
23 factors, including, *inter alia*, “[t]he extent to which a civilian real property aligns with the current
24 mission of the Federal agency” and “[t]he extent to which public access to agency services is
25 maintained or enhanced.” *Id.* §§ 11(b)(3)(F), (J). In addition, the standards developed by OMB
26

1 under FASTA Section 11 “shall incorporate and apply clear standard utilization rates to the
2 extent that such standard rates increase efficiency and provide performance data.” *Id.* § 11(c).

3 24. The third step is for OMB to “submit the standards, criteria, and
4 recommendations . . . to the [PBRB] with all supporting information, data, analyses, and
5 documentation.” *Id.* § 11(d)(1); *see also* § 11(b)(1)(C). This must be done “[n]ot later than 60
6 days after the deadline for submission of agency recommendations under subsection (a)[.]” *Id.*
7 § 11(b)(1). “The standards, criteria, and recommendations developed pursuant to subsection
8 (b) shall be published in the Federal Register and transmitted to the [congressional] committees
9 listed in section 5(c) and to the Comptroller General of the United States.” *Id.* § 11(d)(2).

10 25. Section 12 of FASTA sets forth the PBRB’s duties, which include recommending
11 “Federal civilian real properties” for sale or disposal. The PBRB must make its recommendations
12 within 180 days after a quorum of Board members is appointed. *Id.* § 12(b)(1). In doing so, the
13 PBRB “shall consider the factors listed in section 11(b)(3).” *Id.* § 12(b)(1)(B). The PBRB’s
14 recommendations are transmitted to OMB, *id.* § 12(b)(1)(B), and under Section 13, OMB then
15 reviews the PBRB’s recommendations and approves or disapproves them. *Id.* §§ 13(a)–(b).

16 26. Section 18 of FASTA provides that “[a]ctions taken pursuant to sections 12 and
17 13” and “[a]ctions of the [PBRB]” are exempt from judicial review. FASTA § 18. All other acts
18 or omissions under FASTA are reviewable. *See id.*

19 **E. Defendants’ Decision to Sell the Archives Facility**

20 27. A quorum of five PBRB members was not sworn in until May 2019. Dkt. #16-1
21 at 25 (Fraas Ex. 5). This gave the PBRB until November 2019 to make its recommendations to
22 OMB. *See* FASTA § 12(b)(1).

23 28. As the PBRB publicly acknowledged in its “High Value Assets Report” to OMB,
24 it “encountered significant challenges as it developed the [High Value Asset] disposal
25 recommendations” required by FASTA. Dkt. #16-1 at 35 (Fraas Ex. 5). Specifically, FASTA
26 required the PBRB, not later than 180 days after a quorum of members was appointed, to identify

1 for disposal not fewer than five Federal civilian real properties, that were not on the list of surplus
 2 or excess, with a total fair market of not less than \$500 million and not more than \$750 million,
 3 and transmit the list of properties to the Director of OMB as Board recommendations. FASTA,
 4 § 12(b)(1). According to the agency, “FASTA’s aggressive timeframe forced the PBRB to focus
 5 on properties already for sale and unneeded vacant land that can be sold quickly.” Dkt. #16-1 at
 6 35 (Fraas Ex. 5).

7 29. In addition to challenges caused by FASTA’s accelerated statutory timeframe,
 8 the PBRB faced additional “formidable” challenges “due to the procedure and time required to
 9 qualify the PBRB as an independent agency.” *Id.* As a result, “PBRB members did not have
 10 Government ID’s for over 2 months after being sworn in, and the PBRB had no staff for the first
 11 4 months, leaving substantial work to be accomplished in just 8 weeks.” *Id.*

12 30. It is undisputed that prior to the PBRB recommending properties for sale under
 13 Section 12 of FASTA, OMB and GSA never developed the “standards and criteria” or
 14 “recommendations” described in FASTA Section 11(b). Nor did OMB provide the “information,
 15 data, analyses, and documentation” underlying its nonexistent “standards, criteria, and
 16 recommendations,” to the PBRB as required by Section 11(d)(1). OMB further failed to publish
 17 its nonexistent “standards, criteria, and recommendations” in the Federal Register, transmit them
 18 to the specified Congressional Committees, and transmit them to the Comptroller General of the
 19 United States as required by Section 11(d)(2).

20 31. On October 31, 2019, approximately five months after a quorum of the Board
 21 was established, the PBRB notified OMB that it was submitting its first set of recommendations
 22 pursuant to Section 11 of FASTA.¹ The PBRB included with its three-page letter a one-page list
 23 of fourteen High Value Asset properties that it recommended for disposal. One of those
 24

25
 26 ¹ Letter from the PBRB to OMB (Oct. 31, 2019), https://www.pbrb.gov/assets/uploads/PBRB%20Official%20Recommendations%20to%20OMB%2010_31_2019.pdf (last visited Feb. 9, 2020).

1 properties was the National Archives at Seattle. The only information contained on the list was
2 the name, location, and custodial agency of each property.

3 32. On November 27, 2019, OMB notified the PBRB that it disapproved of the
4 recommendations due to a lack of supporting information or financial execution plan.² OMB
5 gave the PBRB 30 days to resubmit its recommendations.

6 33. On December 27, 2019, the PBRB submitted a revised list to OMB of twelve
7 properties for proposed sale, one of which was the National Archives at Seattle, along with its
8 “High Value Assets Report” (the PBRB Report) that included the purported bases for its
9 proposals. Dkt. #16-1 at 16–123 (Fraas Ex. 5). The PBRB Report acknowledged, but did not
10 analyze, the FASTA exemption for “[p]roperties used in connection with Federal programs for
11 agricultural, recreational, or conservation purposes[.]” *Id.* at 30.

12 34. In its Report, the PBRB further acknowledged that “[u]nfortunately, [it] did not
13 benefit from the Section 11 FASTA directive that OMB, in consultation with GSA, develop
14 standards and criteria to use in evaluating agency submissions and making recommendations to
15 the PBRB,” because they were “never developed.” *Id.* at 33. The PBRB Report further stated
16 that “defined standards, criteria, and recommendations would have significantly reduced the
17 PBRB’s challenges.” *Id.* at 35. Without the “standards, criteria, and recommendations” along
18 with “all supporting information, data, analyses, and documentation,” the PBRB had to rely on
19 other information. FASTA, § 11(d)(1). But, as the PBRB acknowledged, it “faced . . . challenges
20 in gathering the data needed to support decision making for complex real estate transactions.”
21 *Id.* at 35–36. Indeed, the PBRB identified “extraordinary issues with data gaps and data integrity”
22 in the data contained in the Federal Real Property Profile, which it “relied heavily on” for its
23 decision-making. *Id.* at 36.

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25
26 ² Letter from OMB to the PBRB (Nov. 27, 2019), https://www.pbrb.gov/assets/uploads/OMB%20Official%20Response%20to%20PBRB%20Recommendations%2011_27_2019.pdf (last visited Feb. 9, 2020).

35. Defendants submitted a sworn declaration stating that the Archives facility was identified for potential sale by a private contractor of GSA and submitted to the PBRB by “the private sector” under FASTA § 12(d)(1), and argued that this is a process separate from FASTA Section 11. Dkt. #34 (Dugan Decl.).

36. However, a document produced by the PBRB in response to the State of Washington’s FOIA request indicates that the Seattle Archives facility was among the “Additional Recommendations Identified by GSA for Board Consideration.” This is consistent with the PBRB’s High Value Assets Report, which indicates that GSA—not the private sector—identified “additional FASTA candidates through analysis of the FRPP database.” Dkt. #16-1 at 29 (Fraas Ex. 5); *see also id.* at 25 (thanking GSA’s Public Buildings Service department for “additional in-depth analysis of FRPP data to identify other potential FASTA candidates”). Under FASTA, Section 11 applies to property recommendations by federal agencies.

37. In recommending and selecting the Archives facility for sale, Defendants did not notify or consult with tribal leaders or other stakeholders in the Pacific Northwest regarding the Archives facility’s potential sale. *See* Dkt. #17-1 (de los Angeles ¶¶5; Bossley ¶19; Gentry ¶14; King George ¶¶13–15; Gomez ¶7; Harrelson ¶¶7–8; James ¶¶7–8; Johnson ¶¶4–12; Krise ¶6; Matheson ¶8; Pickernell ¶¶7–8; Pierre ¶7; Saluskin ¶7; Schutt ¶¶10–11; Simon ¶20; Stiltner ¶¶8–9; Strong ¶12; Sullivan, J. ¶¶10–17; Taylor, A. ¶¶8–9; Thomas ¶¶7–8; Wooten ¶5; Abe ¶6; Booth ¶7; Carter ¶6; Fisher ¶¶9–10; Klinge ¶¶6–7; Lee ¶15; Norris ¶6; Rushforth ¶10; Taylor, J. ¶6; Carter ¶6). In an October 2020 PBRB meeting, a Board member acknowledged that Tribes were not consulted in selecting properties, stating that “[w]ith respect to tribal entities, I guess, that hasn’t been brought to our attention before that there was an interest there,” while acknowledging “if they are a stakeholder in a property, certainly we would want to consult with them.” Dkt. #16-1 at 139 (Fraas Ex. 7).

1 38. No public meetings or hearings were held in Washington, Idaho, Oregon, or
2 Alaska—and in the meetings and hearings held elsewhere, the potential sale of the Seattle
3 Archives facility was never mentioned.

4 39. After the sale decision became public, many tribal representatives and others sent
5 letters seeking reconsideration. Dkt. #17-1 (Stiltner Exs. B–C; Sullivan, J. Ex. G; Bond Ex. 1;
6 Turner Ex. 1). Defendants did not change their decision to sell the Archives facility.

7 40. On January 24, 2020, OMB summarily approved the sale of the Archives facility
8 and the other properties. Dkt. # 16-1 at 159–60 (Fraas Ex. 11).

9 41. On January 27, 2020, NARA issued a press release in which it indicated that it
10 had “requested to stay in the building for an additional three years following the sale” of the
11 Archives facility. It further acknowledged that “closure of our facility will have a negative
12 impact on researchers, Federal agencies, and other customers that use our facility.”³

13 42. While NARA’s press release also states that it is “planning to extend [its]
14 digitization efforts to make more records available free of charge and regardless of location,”
15 *id.*, NARA has previously failed to keep its commitments with respect to digitization. The
16 Explanatory Statement accompanying Division E of H.R. 133 (Consolidated Appropriations
17 Act, 2021), states: “It is profoundly disappointing that NARA has failed to keep its commitment
18 to digitize and post online using an easy-to-find, navigable, and searchable platform the
19 Territorial and Federal records generated in Alaska since they were moved from Anchorage to
20 Seattle more than 5 years ago.” H.R. 133, Explanatory Statement, Division E at 44–45, *available*
21 *at* <https://tinyurl.com/y65of8wa> (last visited Feb. 9, 2021).

22 43. The PBRB Report indicates that, once the Archives facility is sold, its records
23 will be shipped to other NARA facilities in Southern California and Missouri. Dkt. #16-1 at 113
24 (Fraas Ex. 5 at A-71).

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26 ³ NARA Press Release, Seattle Facility Approved for Closure (Jan. 27, 2020), <https://www.archives.gov/press/press-releases/2020/nr20-37>.

44. On February 3, 2020, the State of Washington submitted FOIA requests to the PBRB, OMB, GSA, and NARA regarding the proposed sale of the Archives Facility, and later sued to obtain the documents. *See* Dkt. #5. On January 5, this Court, per the Honorable Robert S. Lasnik, ordered the PBRB to respond in full to the State’s FOIA request by February 4, 2021. *State of Washington v. Public Buildings Reform Board*, No. 2:20-cv-01362-RSL, Dkt. #18 (Jan. 5, 2021). This included documents that had been “identified by the Public Buildings Reform Board as of July 22, 2020” but never provided to the State of Washington. *Id.* One of the documents produced in response to the order was filed in this case.

45. On November 30, 2020, the State of Washington learned that the federal government intends to bundle the Archives facility with the other FASTA properties and sell them as “a single portfolio,” and that “[t]he Government intends to bring the properties to market by early 2021.” Dkt. #16 (Fraas Decl.) ¶15; Dkt. # 16-1 at 161–62 (Fraas Ex. 12). Defendants did not alert Plaintiffs of this decision nor seek their input. Dkt. #16 (Fraas Decl.) ¶15.

46. On December 4, 2020, the State of Washington publicly announced its intention to challenge the sale of the Archives facility.⁴

47. On January 4, 2021, Plaintiffs filed their Complaint in this matter. Dkt. #1. On January 25, 2021, Plaintiffs filed their First Amended Complaint, adding ten additional Plaintiffs. Dkt. #30.

F. Harm to Plaintiffs as a Result of the Sale

48. The sale and closure of the Archives facility under FASTA and the subsequent removal of NARA’s archival records from the Pacific Northwest will significantly impede Plaintiffs’ access to documents on which they rely.

49. Travel outside of the Pacific Northwest to access the archival records needed for these foundational purposes is simply not feasible for many Plaintiff Tribes and their members.

⁴ News Release, AG Ferguson Intends to File Lawsuit Against Trump Administration to Prevent, Imminent Sale of National Archives Building in Seattle (Dec. 4, 2020), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-intends-file-lawsuit-against-trump-administration-prevent-imminent>.

1 Some lack the financial resources to access these records on a necessary basis if they are moved
 2 out of the Pacific Northwest. A move would increase travel costs for gaining access to materials
 3 in person and in some cases prevent access due to lack of funds to access the materials.
 4 Dkt. #17-1 (Gentry ¶14; Gomez ¶¶6, 8; Harrelson ¶9; James ¶9; Krise ¶7).

5 50. At a minimum, these documents will be inaccessible for an unknown time period
 6 during transit and processing, and could be separated or even irreparably damaged during the
 7 move. *Id.* (Bossley ¶22; Fisher ¶8; Gentry ¶¶13–14; King George ¶16; Harrelson ¶9; House ¶14;
 8 Saluskin ¶¶6, 9; Taylor, A. ¶5).

9 51. Many historians and community members expound not only on the importance
 10 of access to original documents, but also on the benefits of being able to visit the Archives in
 11 person, browse its records, and benefit from the knowledge of its local staff. Dkt. #17-1 (Bond
 12 ¶¶9, 16; Coen ¶¶3–4; Fisher ¶¶4–6, 12; Hall ¶4; House ¶¶ 3–6, 9; Klinge ¶8; Nicola, R. ¶3;
 13 Nimura ¶3; Oberg ¶8; Reich ¶¶6–8; Schutt ¶5; Smythe ¶3; Sullivan, M. ¶12; Taylor, J. ¶5, 7;
 14 Turner ¶4; Wilson ¶26; Wisniewski ¶11). This critical usage and access will be lost if the sale
 15 moves forward and the Pacific Northwest’s archival records are shipped far away. *Id.* (Oberg ¶8;
 16 Nicola, P. ¶6; Thrush ¶5; Stein, J. ¶11; Taylor, J. ¶7; Turner ¶9).

17 II. PLAINTIFFS’ PROPOSED CONCLUSIONS OF LAW

18 A. The Court Has Subject-Matter Jurisdiction

19 1. The Court has subject-matter jurisdiction over this case. FASTA Section 18
 20 provides that “[a]ctions taken pursuant to sections 12 and 13” and “[a]ctions of the Board” are
 21 not subject to judicial review. In the APA, context, limitations on judicial review are construed
 22 narrowly. *Allen v. Milas*, 896 F.3d 1094, 1103 (9th Cir. 2018); *ANA Int’l, Inc. v. Way*, 393 F.3d
 23 886, 891 (9th Cir. 2004). Plaintiffs’ claims that the Archives facility is exempt from sale under
 24 Section 3 of FASTA (Count I) and that defendants failed to comply with Section 11 of FASTA
 25 (Counts II and III) do not fall within Section 18’s bar on judicial review.
 26

2. While “[a]ctions of the Board” under FASTA are not subject to judicial review, this Court has the power to enjoin the Board from taking actions to further a property sale that is in violation of FASTA.

B. Plaintiffs Have Standing

3. Plaintiffs have standing to bring this lawsuit. Plaintiffs have met each element of Article III standing: (1) injury in fact, (2) causation, and (3) redressability. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs will be injured by the sale of the Archives facility and consequent transfer of its records to facilities outside the Pacific Northwest, which will deprive them of meaningful access to those records. The injury is redressable because there is no evidence the transfer will occur absent a sale of the property, and this Court has the power to review and prevent a sale that violates FASTA.

4. Plaintiffs are also within the zone of interests of FASTA. In the APA context, the zone-of-interests test is “not especially demanding.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1270 (9th Cir. 2020). Here, Plaintiffs’ interests are neither “marginally related to” nor “inconsistent with” FASTA’s purposes, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012), and this lawsuit seeking to enforce FASTA’s requirements furthers rather than frustrates FASTA’s objectives. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 397 (1987).

5. Defendants do not challenge any State Plaintiffs’ standing to protect its sovereign, proprietary, or *parens patriae* interests, nor do Defendants challenge any Plaintiffs’ organizational standing.

C. Plaintiffs Meet the Standard for Preliminary Injunctive Relief

6. A party seeking a preliminary injunction must show that: (1) it is likely to succeed on the merits; (2) it will likely suffer irreparable harm in the absence of an injunction; (3) the

1 balance of equities tips in its favor, and (4) an injunction is in the public interest. *See* Fed. R.
 2 Civ. P. 65(b)(1); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs have
 3 established each of these elements.

4 7. ““Crafting a preliminary injunction is an exercise of discretion and judgment,
 5 often dependent as much on the equities of a given case as the substance of the legal issues it
 6 presents.”” *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018) (quoting *Trump v. Int’l Refugee*
 7 *Assistance Project*, 137 S. Ct. 2080, 2087 (2017)). “The purpose of such interim equitable relief
 8 is not to conclusively determine the rights of the parties but to balance the equities as the
 9 litigation moves forward.” *Id.* The Court will enjoin Defendants from taking any further steps to
 10 effectuate or facilitate the sale of the Archives facility under FASTA, to preserve the status quo
 11 *pendente lite*.

12 **1. Plaintiffs have shown a likelihood of success on the merits of Count I**

13 8. “Properties used in connection with Federal programs for agricultural,
 14 recreational, or conservation purposes, including research in connection with the programs,” are
 15 exempt from sale under FASTA Section 3(5)(B)(viii). The Archives facility falls within this
 16 exemption and cannot lawfully be sold under FASTA.

17 9. ““Canons of statutory construction help give meaning to a statute’s words. We
 18 begin with the language of the statute.”” *City of Los Angeles v. Barr*, 941 F.3d 931, 940 (9th Cir.
 19 2019) (quoting *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir.
 20 2003) *amended on reh’g en banc in part sub nom. Wilderness Soc’y v. U.S. Fish & Wildlife*
 21 *Serv.*, 360 F.3d 1374 (9th Cir. 2004)). FASTA does not define any of the terms used in the
 22 exemption, including “conservation,” “agricultural,” or “recreational.” *See generally* FASTA
 23 § 3. As such, these terms are to be given ““their ordinary, contemporary, common meaning,””
 24 and the Court ““may consult dictionary definitions.”” *City of Los Angeles*, 941 F.3d at 940
 25 (citation omitted).

10. Webster’s defines “conservation” as, *inter alia*, “a careful preservation and protection of something”; “the things that are done to keep works of art or things of historical importance in good condition”; “planned management of a natural resource to prevent exploitation, destruction, or neglect.” *Conservation*, Merriam-Webster.com, <https://tinyurl.com/yy536v3w> (last visited Feb. 9, 2021). Webster’s defines “recreation” as, *inter alia*, “a means of refreshment or diversion.” *Recreation*, Merriam-Webster.com, <https://tinyurl.com/yy4p8jzp> (last visited Feb. 9, 2021).

11. The phrase “in connection with” is construed broadly. The Supreme Court “has often recognized that ‘in connection with’ can bear a ‘broad interpretation.’” *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006)); *see also In re Plant Insulation Co.*, 734 F.3d 900, 910 (9th Cir. 2013) (“in connection with” is synonymous with “relating to”); *Cal. Tow Truck Ass’n v. City & County of San Francisco*, 807 F.3d 1008, 1022 (9th Cir. 2015) (“relating to” has a “broad” meaning). As the Supreme Court explained, “[i]f Congress intended a narrower interpretation [of the statute], it could easily have used narrower language,” and courts “cannot override Congress’ choice to employ the more capacious phrase ‘in connection with.’” *Mont*, 139 S. Ct. at 1832–33.

12. Plaintiffs have presented un rebutted evidence that the Archives facility is used “in connection with” the following “Federal programs for agricultural, recreational, or conservation purposes,” any of which is sufficient on its own to exempt the Archives facility from sale under FASTA:

- Programs for resource management and historical use of NPS lands;
- Programs for the development of visitor education materials, exhibits, and trailhead and trail signage for U.S. Forest Service projects at national parks and trails;

- 1 • Programs of the Wing Luke Museum, a Smithsonian affiliate and NPS
- 2 Affiliated Area;
- 3 • Programs funded by the NPS for the management of San Juan Island
- 4 National Park; to document and conserve historic places important to Latino and
- 5 African American communities; and to identify Alaska Native historic sites
- 6 eligible for selection under the Alaska Native Claims Settlement Act of 1971,
- 7 which transferred land titles to Alaska Native corporations;
- 8 • Ecological conservation programs of the U.S. Department of Fish and
- 9 Wildlife, U.S. Army Corps of Engineers, Bureau of Land Management, and
- 10 NOAA;
- 11 • Programs carried out by Tribes pursuant to the ISDEAA, under which
- 12 tribal officials are “performing a federal function,”⁵ including programs for
- 13 ecological conservation, climate change impact assessment, natural resource
- 14 management, archaeological and cultural conservation, historic conservation,
- 15 conservation of federal lands in Alaska, and environmental cleanup;
- 16 • Programs related to the Native American Graves Protection and
- 17 Repatriation Act;
- 18 • Programs related to tribal land and water rights, including but not limited
- 19 to treaty rights in the Klamath River Basin⁶;
- 20 • The NPS’s National Register of Historic Places program, Historic Tax
- 21 Credit program, Tribal Preservation Program, Historic American Buildings
- 22 Surveys program, Historic American Engineering Records program, and Federal
- 23 Certified Local Government program; and
- 24

25 ⁵ *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995), cited approvingly in *Demontiney*

26 *v. U.S. ex rel. Dep’t of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 807-08 (9th Cir. 2001).

⁶ *See Baley v. United States*, 942 F.3d 1312, 1316 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133 (2020).

- NARA’s “Preservation Programs,” including the work of its “Conservation Division” and “Conservation Laboratory” to conserve documents, including documents housed at the Seattle Archives facility.

13. Although the complete administrative record is not before the Court at this stage, the Court may consider the un rebutted evidence of the use of the Archives facility in connection with the programs listed above because it is relevant to Defendants’ failure to take required actions and the scope of Defendants’ authority. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

14. Defendants lack any discretion to sell a property under FASTA that is exempt from that statute under its plain terms. *See King v. Burwell*, 576 U.S. 473, 486 (2015) (Court must enforce statute’s plain terms).

15. Accordingly, Defendants’ actions to facilitate and effectuate the sale are not within their authority under FASTA. Plaintiffs are likely to succeed on the merits of Count I of their Complaint. For substantially the same reasons, Defendants’ motion to dismiss Count I is denied.

2. Plaintiffs have shown a likelihood of success on the merits of Counts II and III

16. Counts II and III of Plaintiffs’ Complaint allege that the impending sale of the Archives is unlawful because OMB and GSA failed to fulfill the procedural requirements of FASTA Section 11.

17. Under Section 706(1) of the Administrative Procedure Act (APA), courts “shall compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). “A court can compel agency action under this section only if there is ‘a specific, unequivocal command’ placed on the agency to take a ‘discrete agency action,’ and the agency has failed to take that action.” *Vietnam Veterans of Am. v. C.I.A.*, 811 F.3d 1068, 1075 (9th Cir. 2016) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004)). The required agency

1 action must be “so clearly set forth that it could traditionally have been enforced through a writ
2 of mandamus.” *Id.*

3 18. Section 11(b)–(d) of FASTA specifically and unequivocally requires OMB and
4 GSA to take a number of discrete, nondiscretionary actions. Section 11 repeatedly uses
5 mandatory language in setting forth these duties. *See Nat’l Ass’n of Home Builders v. Defs. of*
6 *Wildlife*, 551 U.S. 644, 661 (2007) (Congress’ “use of a mandatory ‘shall’ ” imposes
7 “discretionless obligations”) (internal citation omitted). Specifically, Section 11 requires that:

8 a. The Director of OMB “shall,” within a specified 60-day period, in
9 consultation with the GSA Administrator, “develop consistent standards and
10 criteria against which [federal agency property sale recommendations] will be
11 reviewed,” § 11(b)(1);

12 b. The Director of OMB and the GSA Administrator “shall jointly develop
13 recommendations to the [PBRB] based on [OMB’s] standards and criteria,”
14 § 11(b)(2);

15 c. The Director of OMB “shall,” within the same specified 60-day period,
16 and in consultation with the GSA Administrator, “submit to the [PBRB] the
17 recommendations developed,” § 11(b)(1), (2);

18 d. The Director of OMB “shall submit the standards, criteria, and
19 recommendations . . . to the [PBRB] with all supporting information, data,
20 analyses, and documentation,” § 11(d)(1); and

21 e. The standards, criteria, and recommendations developed by the Director
22 of OMB “shall be published in the Federal Register and transmitted to the
23 [congressional] committees listed in section 5(c) and to the Comptroller General
24 of the United States.” § 11(d)(2).

25 19. OMB failed to take any of these mandatory procedural steps. OMB, in
26 consultation with GSA, never reviewed the agency recommendations and never developed

1 consistent standards and criteria against which agency recommendations were to be reviewed.
 2 *Id.* § 11(b)(1)(A)–(B). Nor did OMB and GSA ever jointly develop recommendations to the
 3 PBRB. *Id.* § 11(b)(2). Consequently, OMB never provided the nonexistent standards, criteria,
 4 and recommendations to the PBRB, never published them in the Federal Register, never
 5 transmitted them to the specified congressional committees or the Comptroller General, and
 6 never provided the PBRB with all supporting information, data, analyses, and documentation.
 7 *Id.* § 11(d).

8 20. OMB and GSA’s failure to fulfill their most basic duties under FASTA are
 9 “egregious enough to warrant mandamus.”⁷ *Telecomms. Research & Action Ctr. v. F.C.C.*,
 10 750 F.2d 70, 79 (D.C. Cir. 1984) (*TRAC*); see *Agua Caliente Tribe of Cupeno Indians of Pala*
 11 *Reservation v. Sweeney*, 932 F.3d 1207, 1216 n.7 (9th Cir. 2019) (the *TRAC* factors apply to a
 12 request for mandamus under the APA). While the standard is “hardly ironclad,” courts
 13 addressing claims of unlawfully withheld or unreasonably delayed agency action consider the
 14 following factors: (1) agency decision-making timelines must be governed by a “rule of reason”;
 15 (2) where Congress has provided a timetable or other indication of the speed with which it
 16 expects the agency to proceed, that statutory scheme may supply the content for this rule of
 17 reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable
 18 when human health and welfare are at stake; (4) the court should consider the effect of expediting
 19 delayed action on other agency activities; (5) the court should consider the nature and extent of
 20 the interests prejudiced by delay; and (6) the court need not “find any impropriety lurking behind
 21 agency lassitude in order to hold that the agency action is unreasonably delayed.” *TRAC*,
 22 750 F.2d at 80.

23 21. Here, the *TRAC* factors demonstrate that OMB and the GSA’s failures likely
 24 warrant relief under APA Section 706(1). First, as to *TRAC* factors 1 and 2, Congress provided

25
 26 ⁷ At this stage, the Court need only preliminarily enjoin the sale of the Archives Facility to preserve the status quo pending a final judgment. A writ of mandamus need not issue now.

1 a definite “timetable” for the agencies to act: the standards, criteria, and recommendations must
 2 be transmitted to the PBRB within 60 days following the agency-recommendation deadline.
 3 FASTA § 11(b)(1). This timetable makes sense, because FASTA is designed to “expedite[]”
 4 federal property sales, § 2(8), and contemplates that the PBRB will have the benefit of OMB’s
 5 standards, criteria, and recommendations in identifying properties for sale, which it must quickly
 6 do within 180 days after a quorum of Board members is appointed, § 12(b)(1). *See* § 12(b)(3)
 7 (“In identifying properties pursuant to paragraph (1), the [PBRB] shall consider the factors”
 8 incorporated into OMB’s standards and criteria.). Second, as to *TRAC* factors 3 and 5, the
 9 agencies’ failure to fulfill their duties caused the PBRB to recommend selling the Archives
 10 facility without the benefit of the Congressionally-mandated standards, criteria,
 11 recommendations, and “supporting information, data, analyses, and documentation.” The
 12 resulting harms are not purely “economic,” but implicate profound human interests such as tribal
 13 membership and treaty rights, cultural heritage, and regional history. Third, as to *TRAC* factor
 14 4, requiring Defendants to fulfill FASTA’s mandatory procedural requirements before
 15 proceeding with the sale of the Archives is not unduly prejudicial.

16 22. Courts “shall hold unlawful and set aside agency action” that is “without
 17 observance of procedure required by law,” 5 U.S.C. § 706(2)(D), “in excess of
 18 statutory . . . authority,” *id.* § 706(2)(C), or “otherwise not in accordance with law,” *id.*
 19 § 706(2)(A).

20 23. OMB and GSA failed to follow FASTA’s basic procedural requirements,
 21 skipping Section 11(b)–(d)’s mandatory steps. As such, Plaintiffs are likely to succeed on the
 22 merits of their claim that Defendants’ actions under FASTA are procedurally deficient, *ultra*
 23 *vires*, and contrary to law.

24 24. Defendants were not authorized to sell the Archives facility under FASTA absent
 25 compliance with the statute’s procedural prerequisites. *See, e.g., Ctr. for Biological Diversity v.*
 26 *U.S. Forest Serv.*, 349 F.3d 1157 (9th Cir. 2003) (U.S. Forest Service failed to comply with

1 procedures required by National Environmental Policy Act's (NEPA) procedural requirements);
 2 *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109 (1st Cir. 2002) (Secretary of Commerce failed
 3 to comply with Atlantic Coastal Fisheries Cooperative Management Act's "explicit procedural
 4 requirement to consult with the appropriate councils before implementing" fishing regulations);
 5 *N.Y. Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 182 (2d Cir. 2005) (EPA failed
 6 to comply with Clean Air Act's requirement that operating permits for non-compliant air
 7 pollution sources must include a compliance schedule).

8 25. In addition, OMB and GSA's procedural failures were not "harmless." *See*
 9 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error" in APA review). The
 10 Ninth Circuit has stressed that courts must exercise "great caution" in applying the harmless
 11 error rule: a procedural failure is "harmless only where the agency's mistake clearly had no
 12 bearing on the procedure used or the substance of the decision reached." *Cal. Wilderness Coal.*
 13 *v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090 (9th Cir. 2011). "The reason is apparent: Harmless
 14 error is more readily abused [in the administrative context] than in the civil or criminal context."
 15 *Id.* To avoid "gutting" Congress' procedural safeguards, "harmless error analysis in
 16 administrative rulemaking must therefore focus on the process as well as the result." *Id.*; *see*
 17 *also, e.g., Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 534 (D.C. Cir.
 18 2018) (rejecting harmless error defense to claim that agency violated procedural requirements).

19 26. Here, OMB and GSA's failure to comply with Section 11's procedural
 20 requirements is inherently harmful. The publication and transmittal requirements (FASTA
 21 § 11(d)(2)) ensure transparency in the standards for evaluating properties recommended for
 22 expedited sale, while the requirement to provide "standards, criteria, and recommendations" and
 23 the underlying "information, data, analyses, and documentation" (FASTA § 11(d)(1)) is meant
 24 to guide the PBRB and provide it with relevant factual information on which to base its
 25 recommendations. *See id.* § 12(b)(3) ("In identifying properties pursuant to paragraph (1), the
 26 [PBRB] shall consider the factors" incorporated into OMB's standards and criteria.); H.R. Rep.

No. 114-578, pt. 1, at 13 (2016) (OMB’s provision of property data to the PBRB under Section 11 is “necessary” because “this data is critical to ensuring proper recommendations are developed”). Indeed, similar to NEPA, Section 11 “imposes only procedural requirements,” which “ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information” that bears on its decision-making. *Winter*, 555 U.S. at 23. It also ensures that OMB has an informed, factual basis on which to “conduct a review” of the PBRB’s recommendation. *See* FASTA § 13(a). OMB and GSA’s violations of Section 11 cannot be “forgiven merely because they are procedural”: the procedures are the point. *Oglala Sioux Tribe*, 896 F.3d at 534.

27. Moreover, the PBRB, itself, acknowledged in its High Value Assets Report that it “encountered significant challenges as it developed the [high value asset] disposal recommendations” and that it “faced, and continues to face, challenges in gathering the data needed to support decision making for complex real estate transactions.” Dkt. #16-1 at 35 (Fraas Ex. 5). It further stated that “[u]nfortunately, the PBRB did not benefit from the Section 11 FASTA directive that OMB, in consultation with GSA, develop standards and criteria to use in evaluating agency submissions and making recommendations to the PBRB” and that “[t]o the best of the PBRB’s knowledge, the standards and criteria were never developed.” *Id.* at 33. It admitted that “defined standards, criteria, and recommendations would have significantly reduced the PBRB’s challenges.” *Id.* at 35.

28. Accordingly, because it is undisputed that OMB failed to satisfy its mandatory Section 11 obligations and because it is also undisputed that OMB’s failures resulted in additional challenges for the PBRB in the FASTA process, Plaintiffs are likely to succeed on the merits of Counts II and III of their Complaint. For substantially the same reasons, Defendants’ motion to dismiss Counts II and III is denied.

1 **3. Plaintiffs have shown a likelihood of irreparable harm absent injunctive**
 2 **relief**

3 29. Irreparable harm is harm “for which there is no adequate legal remedy, such as
 4 an award of damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).
 5 The harm analysis “focuses on irreparability, irrespective of the magnitude of the injury.” *Azar*,
 6 911 F.3d at 581 (internal quotation marks omitted).

7 30. The sale and closure of the Archives facility under FASTA and the subsequent
 8 removal of NARA’s archival records from the Pacific Northwest is likely to cause irreparable
 9 harm to Plaintiffs and the regional public at large.

10 31. Tribal governments, Alaska Native Corporations, and tribal communities will be
 11 irreparably harmed if the Seattle Archives facility is sold because tribes and their members are
 12 uniquely dependent on the facility’s records for core tribal functions and cultural preservation.
 13 The tribal governments and communities have, for instance, regularly use the Archives facility
 14 to vindicate tribal land rights, protect treaty hunting and fishing rights, implement historic
 15 preservation efforts, investigate eligibility for tribal membership, seek federal recognition,
 16 defend tribal sovereignty, conduct cultural anthropology work, and protect subsistence rights
 17 and conservation interests.

18 32. For many Plaintiffs and their members, travel outside of the Pacific Northwest to
 19 access the records is not possible. Where travel is possible, financial harm—including travel
 20 costs—is irreparable where, as here, sovereign immunity prevents recovery from the federal
 21 government. *See Azar*, 911 F.3d at 581; *Idaho v. Coeur d’Alene Tribe*, 794 F.3d 1039, 1046 (9th
 22 Cir. 2015).

23 33. Plaintiffs Washington and Oregon also risk irreparable harm if the Seattle facility
 24 is closed and archival records are removed from the Pacific Northwest. Irreparable harm to state
 25 agencies’ organizational missions satisfies the *Winter* test and establishes standing. *See E. Bay*
 26

1 *Sanctuary*, 950 F.3d at 1265–66, 1280; *League of Women Voters of U.S. v. Newby*, 838 F.3d 1,
 2 8 (D.C. Cir. 2016); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013).

3 34. The sale and closure of the Archives facility also harms the proprietary interests
 4 of Washington and Oregon’s public universities, which rely upon the Archives for recruitment
 5 and scholarship, as well as state agencies that regularly rely on the Archives to carry out their
 6 functions. *See Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir.
 7 1984) (actionable harms include “impairment of [the university’s] ongoing recruitment programs
 8 [and] the dissipation of alumni and community goodwill and support garnered over the
 9 years”); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d
 10 597, 603 (9th Cir. 1991) (“[I]ntangible injuries, such as damage to ongoing recruitment efforts
 11 and goodwill, qualify as irreparable harm.”).

12 35. Plaintiff historical societies, museums, and community organizations also have
 13 standing and will suffer irreparable harm to their missions if the Archives records are moved out
 14 of the Pacific Northwest. *See E. Bay Sanctuary*, 950 F.3d at 1265; *Newby*, 838 F.3d at 8. For
 15 example, members of the American Historical Association, the world’s largest professional
 16 historian organization, regularly use the facility for their historical work. Members of community
 17 organizations such as the Chinese American Citizens Alliance and OCA – Asian Pacific
 18 Advocates, who rely on the Archives to learn about their own histories and teach about the tragic
 19 errors of the past, will also be irreparably harmed.

20 36. Given the significant harm that would occur if the Archives facility is sold under
 21 FASTA, a preliminary injunction is necessary to maintain the status quo to ensure the sale does
 22 not proceed before the claims in this matter are resolved.

23 37. Moreover, Defendants’ procedural failings alone constitute irreparable harm and
 24 further support Plaintiffs’ request for a preliminary injunction. *See Azar*, 911 F.3d at 581
 25 (affirming finding of “irreparable procedural harm” and “reaffirming that the harm flowing from
 26 a procedural violation can be irreparable”); *Save Strawberry Canyon v. Dep’t of Energy*, 613 F.

Supp. 2d 1177, 1189–90 (N.D. Cal. 2009) (irreparable harm satisfied by claimed procedural violation).

4. The equities and public interest weigh strongly in Plaintiffs’ favor

38. The equities and the public interest also strongly favor injunctive relief. Because the government is a party, these inquiries merge. *Drake’s Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

39. As set forth above, Plaintiffs have established that they are likely to succeed in their claims that sale of the Archives facility violates FASTA. Accordingly, it is in the public interest to “curtail unlawful executive action.” *Hawai’i v. Trump*, 859 F.3d 741, 784 (9th Cir. 2017) (citation omitted), *vacated on other grounds and remanded by Trump v. Hawai’i*, 138 S. Ct. 377 (2017); *see Planned Parenthood of Great N.W. & Hawaiian Islands, Inc. v. Azar*, 352 F. Supp. 3d 1057, 1066 (W.D. Wash. 2018) (“The Ninth Circuit has recognized that ‘the public interest favors applying federal law correctly.’” (citation omitted)). That is because “[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.” *Newby*, 838 F.3d at 12 (citations and internal quotation marks omitted). Thus, the public interest weighs in favor of having a likely unlawful process curtailed.

40. The equities also weigh particularly strongly in Plaintiffs’ favor due to the federal government’s failure to consult with tribal leaders, its failure to hold any public hearings or meetings in the Pacific Northwest, and its broken promise to digitize Alaska records that were moved to Seattle when NARA’s Anchorage facility closed in 2014.

III. PLAINTIFFS’ PROPOSED INJUNCTIVE RELIEF

1. This matter came before the Court on Plaintiffs’ Motion for Preliminary Injunction. The Court has considered Plaintiffs’ Motion for Preliminary Injunction and the supporting declarations and exhibits thereto; Defendants’ Response and the supporting

1 declarations and exhibits thereto; Plaintiffs' Reply and the supporting declarations and exhibits
 2 thereto; the briefs of amici curiae; the entire record herein; and the applicable law, and is fully
 3 apprised of the matter.

4 2. The Court finds that Plaintiffs have established a likelihood of success on the
 5 merits of their claims that the Federal Archives and Records Center located at 6125 Sand Point
 6 Way NE, Seattle, Washington, 98115 (Archives facility), is exempt from being sold under the
 7 Federal Assets Sale and Transfer Act, Pub. L. 114-287, as amended (FASTA); and that
 8 Defendants Office of Management and Budget and General Services Administration failed to
 9 follow the procedural requirements of FASTA Section 11; and that Defendants' actions to
 10 facilitate and effectuate the sale of the Archives facility are therefore in violation of the
 11 Administrative Procedure Act. The Court further finds that Plaintiffs have established a
 12 likelihood that they will be irreparably harmed if the Archives facility is sold and the records it
 13 holds are no longer available to members of the public in the Pacific Northwest, and that the
 14 balance of equities and the public interest weigh in favor of a preliminary injunction to maintain
 15 the status quo pending final resolution of Plaintiffs' claims.

16 3. The Court therefore ORDERS that Plaintiffs' Motion for Preliminary Injunction
 17 is GRANTED. Defendants and all their respective officers, agents, servants, employees and
 18 attorneys, and any persons in active concert or participation with them, are hereby ENJOINED
 19 from selling the Archives facility under FASTA, and from taking any actions to facilitate or
 20 effectuate a sale of the Archives facility under FASTA, until a final determination on the merits
 21 is issued by this Court. Defendants shall take any and all steps necessary to ensure compliance
 22 with the terms of this Order.

23 4. IT IS FURTHER ORDERED that Defendants shall notify their officers, agents,
 24 representatives, servants, employees, attorneys, and all persons in active concert or participation
 25 with them of the requirements of this Order.
 26

1 5. The Court deems that no security bond is required under Federal Rule of Civil
2 Procedure 65(c).

3 6. This preliminary injunction shall remain in effect until a final judgment is entered
4 or until further order of the Court.

5 DATED this 10th day of February, 2021.

6 ROBERT W. FERGUSON
7 Washington State Attorney General

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